

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2249

Cir. Ct. No. 2010CV1432

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ADVANTAGE PRIVATE CABLE,

PLAINTIFF-RESPONDENT,

V.

GREENBRIAR APARTMENTS, LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
PATRICK J. TAGGART, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 SHERMAN, J. This is a breach of contract case in which Greenbriar Apartments, LLC, appeals a judgment awarding Advantage Private Cable compensatory damages, plus interest, attorneys' fees and costs, for

Greenbriar's breach of a cable television contract. On appeal, Greenbriar challenges the circuit court's subject matter jurisdiction, the court's interpretation of the contract, the court's award of damages, and the court's denial of Greenbriar's motion to amend the pleadings. We affirm.

BACKGROUND

¶2 Greenbriar is an assisted living facility located in Baraboo, Wisconsin. In 2007, Greenbriar's manager at the time, Kathy Alvin, contacted Advantage, a provider of satellite cable systems, about switching Greenbriar's cable provider. It is undisputed that in October 2007, Alvin, on behalf of Greenbriar, executed a "Cable TV and Communications Service Agreement" with Advantage, that in October or November 2007, Advantage installed cable equipment at Greenbriar, and that Greenbriar timely paid Advantage for its services every three months until approximately July 2010.

¶3 In late summer or early fall 2010, Greenbriar's new manager, Renee Chang, contacted Advantage about the cable services provided by Advantage. Chang was informed that Greenbriar had a ten-year contract with Advantage and Chang requested that a copy of the contract be faxed to her. After receiving a copy of the contract, Chang wrote to Advantage informing it that Alvin had not had authority to enter into a contract with Advantage on behalf of Greenbriar. Chang also questioned whether Alvin had seen and agreed to the contract, and Chang stated that Greenbriar believed that the contract between it and Advantage was invalid. Chang asked Advantage to pick up its cable equipment from Greenbriar's premises, which she stated Greenbriar was storing for Advantage at a monthly fee of \$1,565.00, and she stated that Greenbriar

expected a refund from Advantage in the amount of \$20,000 to “reimburse Greenbriar for overpayment.” In a letter dated September 15, 2010, Advantage responded that the contract was valid and advised Chang that Advantage expected payment of all amounts owing under their contract. Upon receipt of Advantage’s September 15, 2010 letter, Chang continued to dispute the validity of the contract between Greenbriar and Advantage, and no further payments were made to Advantage.

¶4 In December 2010, Advantage brought suit against Greenbriar for breach of contract. Greenbriar asserted “all affirmative defenses as set forth in [WIS. STAT.] § 802.02” (2011-12)¹ and counterclaimed for damages incurred as a result of Advantage’s failure to pick up its cable equipment from Greenbriar’s premises. A trial to the circuit court was held in September 2011. At trial, the parties disputed whether the contract signed by Alvin specified the length of the contract, which Advantage maintained was ten years. Advantage maintained that the contract did and Greenbriar maintained that it did not.

¶5 In January 2012, Greenbriar moved the court to amend the pleadings to assert claims against Advantage for fraud and misrepresentation. In a February 2012 memorandum decision, the circuit court denied Greenbriar’s motion on the basis that Greenbriar had not adequately pled either claim. In its February 2012 decision, the court also found in favor of Advantage. The court determined that Greenbriar and Advantage had entered into a valid contract, which provided that

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Advantage would provide cable services to Greenbriar for a period of ten years. The court found that Greenbriar had breached the contract and ordered Greenbriar to pay the remaining balance owing under the terms of the contract, approximately \$46,000, as well as interest, actual costs and attorney's fees. The court also ordered Greenbriar to return Advantage's equipment.

¶6 Greenbriar moved the circuit court for reconsideration and for a new trial. Greenbriar argued in part that the circuit court lacked subject matter jurisdiction over the proceeding because the contract contained a forum selection clause which provided that "the sole venue and jurisdiction shall be in the Circuit Court of Sangamon County, Springfield, Illinois, which the parties hereby agree to as the sole forum for this Agreement." The circuit court denied Greenbriar's motions, and judgment was entered in favor of Advantage. Greenbriar appeals.

DISCUSSION

¶7 Greenbriar challenges: (1) the circuit court's subject matter jurisdiction; (2) the court's determination that the contract between it and Advantage was a valid contract for ten years; (3) the damage award; and (4) the court's denial of Greenbriar's motion to amend the pleadings. We address each issue in turn below.

A. Subject Matter Jurisdiction

¶8 Greenbriar contends that the circuit court lacked subject matter jurisdiction over the proceeding below because the mandatory forum selection clause in the contract specified that "the sole ... jurisdiction" over any dispute pertaining to the contract "shall be in the Circuit Court of Sangamon County,

Springfield, Illinois.” According to Greenbriar, forum selection clauses may be used by individuals to “limit[]” a court’s subject matter jurisdiction over contractual disputes, and that in this case, the forum selection clause “deprived” the circuit court of subject matter jurisdiction over Greenbriar’s and Advantage’s dispute.

¶9 Subject matter jurisdiction is a court’s power to decide certain types of cases. *State v. Starks*, 2013 WI 69, ¶36, ___ Wis. 2d ___, 833 N.W.2d 146. We have explained that “[b]ecause Article VII, Section 8 of the Wisconsin Constitution states that, ‘[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state’ ... ‘no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.’” *Id.* (quoting *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶8, 273 Wis. 2d 76, 681 N.W.2d 190)). Thus, Greenbriar’s claim that the circuit court lacked subject matter jurisdiction over the proceeding is without merit.

¶10 Greenbriar also contends that under the terms of the contract’s forum selection clause, the contract dispute has to be tried in Illinois. Greenbriar seems to suggest that the forum selection clause deprived the circuit court of competency. However, Greenbriar first challenged the circuit court’s authority over the matter on appeal, well after the trial resulted in a verdict against Greenbriar. Thus, we conclude that Greenbriar forfeited the right to enforce the forum selection clause or otherwise argue that the circuit court lacked competency. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (generally, arguments raised for the first time on appeal are deemed waived).

B. Contract Terms

¶11 Greenbriar contends the circuit court erred in determining that under the terms of its contract with Advantage, Greenbriar agreed that Advantage would provide cable services to Greenbriar for a period of ten years.²

¶12 The interpretation of a contract is normally a matter of law for the court to decide. *Central Auto Co. v. Reichert*, 87 Wis. 2d 9, 19, 273 N.W.2d 360 (Ct. App. 1978). However, when the terms of the contract must be construed using extrinsic evidence, the question is one for the trier of fact. *Id.*

¶13 At trial, multiple copies of the parties' agreement were admitted into evidence, some of which did not include copies of all pages of the agreement. One copy of the Agreement comprised eight pages, included twenty-two provisions, and contained the signatures of both Advantage's representative and Alvin on the eighth page. Provision fifteen of this copy provided: "The original term of this agreement is 10 years from the date of completion of the installation of the System." Another copy, which was admitted into evidence by Advantage, contained only the first seven pages of the contract. This copy contained all but one section of the twenty-two provisions, and did not include the eighth page which contained Alvin's signature.

¶14 On appeal, Greenbriar argues that Advantage failed to establish that Alvin signed a version of the contract specifying a ten-year contractual term. Noting that the copy of the agreement submitted into evidence by Advantage did

² Greenbriar initially frames its arguments as challenging the validity of the contract as a whole. However, the argument it develops is limited to the question of whether Greenbriar agreed to a contractual term of ten years. Accordingly, we limit our analysis to that issue.

not contain the eighth page with Alvin’s written signature, Greenbriar argues that “[t]he differences between the versions of the contract submitted at trial demonstrate that [] Alvin was never faxed a complete copy of the agreement.” Greenbriar also argues that Alvin testified at trial, without contradiction, that she had a verbal agreement with a representative of Advantage that the contract would be for a term of one-year, and that this representative was aware that Alvin was not authorized to enter into any long-term contracts on behalf of Greenbriar.

¶15 At trial, the CEO and the executive manager of Advantage testified that as a matter of business practice, complete contracts were always faxed or mailed to clients. Both individuals also testified that, with few exceptions, Advantage’s cable contracts were always for a period of ten years in order to make its rates more competitive while at the same time enabling it to recapture its investment. The circuit court, who is the ultimate arbiter of a witness’s credibility, found the testimony of Advantage’s representative to be “very credible.” *See Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (The circuit court is the ultimate arbiter of a witness’s credibility). Because there is sufficient evidence in the record to support the court’s factual finding that Alvin received a full copy of the contract, including the page specifying the term of the contract, we affirm the circuit court’s finding.

C. Damages

¶16 Greenbriar challenges the amount of damages awarded to Advantage.

¶17 When reviewing an award of damages, we apply a highly deferential standard of review. *Selmer Co. v. Rinn*, 2010 WI App 106, ¶28, 328 Wis. 2d 263, 789 N.W.2d 621. When sufficient evidence supports the circuit court’s finding of

damages, we must uphold that finding unless it is clearly erroneous. ***Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.***, 2011 WI App 35, ¶21, 331 Wis. 2d 740, 796 N.W.2d 806. “It is not [the reviewing court’s] purpose to determine whether damage awards are high or low, nor to substitute [its] judgment for that of the jury or the [circuit] court but rather to determine whether the award is within reasonable limits.” ***Selmer Co.***, 328 Wis. 2d 263, ¶28 (quoted source omitted).

¶18 The circuit court awarded Advantage \$46,000, which was the total amount of quarterly charges Greenbriar remained contractually obligated to pay Advantage under their agreement. The court also ordered Greenbriar to return Advantage’s equipment.

¶19 Greenbriar argues that absent an acceleration clause in the contract, the circuit court did not have authority to award Advantage damages for future payments owing under the contract. Greenbriar asserts that rather than awarding Advantage the total amount ultimately owing under the terms of the contract in one upfront payment, the circuit court should have “at most” ordered Greenbriar to pay Advantage quarterly payments of \$1,500.45 for the remainder of the contract term. Greenbriar has provided no authority for the proposition that, when there is a repudiation of a contractual obligation that consists of future installment payments, the court may not base the award of damages on that remaining balance. Greenbriar also did not present to the circuit court any evidence from which the court could decide that the remaining balance should be reduced by a particular amount to accurately reflect the damage to Advantage. Accordingly, we reject this argument.

¶20 Greenbriar next argues that if it was proper for the court to award Advantage damages for future payments not yet due, the court should have

discounted the amount owing to the present value at the time of the award. Greenbriar failed to present any evidence at trial that would have supported reducing the payments owing to their present value, and thus, there was no basis for the court to do so.

¶21 Finally, Greenbriar claims that the court improperly awarded Advantage double damages by ordering Greenbriar to pay Advantage the full amount of service fees contracted for and to return the cable equipment, which Advantage could then lease to another customer. However, as noted by Advantage, Greenbriar failed to present evidence showing what value, if any, the returned equipment would have for Advantage. Without any such evidence, this court is unable to determine whether Advantage was effectively awarded double damages.

¶22 Accordingly, we reject Greenbriar's challenges to the damage award.

D. Amendment of the Pleadings

¶23 Relying on WIS. STAT. § 802.09(2), Greenbriar contends the circuit court should have allowed it to amend its pleadings to assert claims against Advantage for fraud and misrepresentation.

¶24 A circuit court's decision to grant or deny leave to amend pleadings is discretionary and we will not upset that decision unless the circuit court erroneously exercised its discretion. *Hess v. Fernandez*, 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 655 (2005). "A circuit court has properly exercised its discretion when it has 'examined the relevant facts, applied a proper legal

standard, and, using a demonstrated rational process, reached a reasonable conclusion.”” *Id.* (quoted source omitted).

¶25 Under WIS. STAT. § 802.09(2), if issues not raised by the pleadings “are tried by express or implied consent of the parties, [the issues] shall be treated in all respects as if they had been raised in the pleadings” and amendment of the pleadings is required to conform the pleadings to the evidence.³ See *Hess*, ¶14. Greenbriar does not contend that Advantage expressly consented to the trial of the fraud and misrepresentation claims. Accordingly, the question before us is whether Advantage impliedly consented to the trial of either issue.

¶26 To find that an issue was tried by implied consent, the opposing party must have had actual notice, meaning “the party not objecting is aware that the evidence goes to the unpleaded issue.” *Id.*, ¶¶14, 21. A party seeking to amend pleadings based upon implied consent must prove that the opposing party was “fully aware” that: (1) the party seeking amendment was “trying a claim” under the unpleaded theory; and (2) the opposing party “could be liable” under the unpleaded claim. See *id.*, ¶22.

¶27 Greenbriar argues that Advantage had actual notice of the fraud and misrepresentation claims at trial because Advantage’s position at trial rested on Alvin’s claim that the ten-year term specified in the contract contradicted a promise by a sales representative of Advantage that the contractual term was for only one year. According to Greenbriar, its argument “that the 10-year provision

³ WISCONSIN STAT. § 802.09(2) also authorizes the discretionary amendment of pleadings in situations where “evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings.” This situation is not at issue here.

was fraudulently added to the contract after [] Alvin signed [was] central to [its] position, and was readily apparent from both Greenbriar’s Answer and trial testimony.”

¶28 Greenbriar has not cited this court to any direct evidence, and our review of the record reveals that there appears to be none, that Advantage was “fully aware” that Greenbriar intended to make claims against it for fraud and misrepresentation. From the time this action was commenced until the close of evidence at trial, Greenbriar appears to have made no reference to either potential causes of action. Because we conclude that Greenbriar failed to establish that Advantage had actual notice of the claims, we conclude that the circuit court’s denial of Greenbriar’s motion to amend the pleadings was not erroneous.

CONCLUSION

¶29 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

